IN THE HIGH COURT OF JUDICATURE OF ANDHRA PRADESH AT HYDERABAD

(Special Original Jurisdiction)

Wednesday, the Sixteenth Day of March

Two Thousand and Five

PRESENT

THE HON'BLE SRI JUSTICE M.H.S.ANSARI

AND

THE HON'BLE SRI JUSTICE T.CH.SURYA RAO

WRIT PETITION No.6101 of 2005

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Between :

M/s. Yanar Packs, a Partnership Firm, rep.by its

Managing Partner K.S.S.Nageswar Rao,

S/o.late K.Pattabhi Ramaiah, aged 56 years,

Occ: Business, r/o.Ameerpet, Hyderabad.

… Petitioner.

A n d

1. Assistant Commissioner of Central Excise,

Hyderabad VII Division (K Division), Hyderabad.

2. Joint Commissioner of Customs & Central Excise,

Hyderabad IV Commissionerate.

3. Superintendent of Central Excise,

Kompally Range, Hyderabad.

4. The Commissioner of Customs & Central Excise

(Appeals II), 7th Floor, Central Revenue Building,

L.B.Stadium Road, Basheerbagh, Hyderabad.

… Respondents.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed herein the High Court will be pleased to issue a writ, order or direction more particularly one in the nature of Writ of Certiorari calling for the records relating to the orders in Original No.73/96 dated 8-3-1996 and 92/96, dated 28-3-1996 on the file of the 1st respondent, order in Appeal No.31 & 32 of 2005 (H-IV) CE, dated 28-2-2005 on the file of the 4th respondent and consequential proclamation of sale 10-3-2005 including auction notice published in the newspaper Deccan Chronicle dated 11-3-2005 to sell the petitioner's property on 22-3-2005 issued by the 2nd respondent and to quash the same as being illegal, arbitrary, violative of Article 14 of the Constitution of India and consequently stay all further proceedings pursuant to the said orders and also direct the respondents not to sell any of the properties of the petitioner firm in terms of the original orders passed by the 1st respondent in O.I.O.No.92/96, dated 28-3-1996 and O.I.O.No.73/96 dated 8-3-1996 and consequential orders and paper notification.

Counsel for the petitioner : Sri P.Venugopal

Counsel for the respondents : Sri A.Rajasekhar Reddy,

SC for Central Government.

The Court made the following :

To

1. Assistant Commissioner of Central Excise,

Hyderabad VII Division (K Division), Hyderabad.

2. Joint Commissioner of Customs & Central Excise,

Hyderabad IV Commissionerate.

3. Superintendent of Central Excise,

Kompally Range, Hyderabad.

4. The Commissioner of Customs & Central Excise

(Appeals II), 7th Floor, Central Revenue Building,

L.B.Stadium Road, Basheerbagh, Hyderabad.

5. Two C.D. copies

THE HON'BLE SRI JUSTICE M.H.S.ANSARI

AND

THE HON'BLE SRI JUSTICE T.Ch.SURYA RAO

WRIT PETITION No.6101 OF 2005

ORAL ORDER: (per Sri Justice T.Ch.SURYA RAO)

The writ petition is directed against the order dated 28-2-2005 passed by the learned Commissioner of Customs & Central Excise (Appeals-II), Hyderabad. The writ petitioner sought to file appeals No.31 & 32/2005 (H-IV) CE before the Commissioner of Customs assailing the assessment order No.73/96, dated 8-3-1996 and 92/96, dated 28-3-1996 passed by the Assistant Commissioner of Central Excise, Division VII, Hyderabad. Under the impugned order, the learned appellate authority, on the premise that the said appeals having been filed beyond the period of limitation of sixty days, more so after eight years after despatch of the order in

original (OIO), rejected the appeals as time-barred. *Inter alia*, in the impugned order, the appellate authority observed that the orders in original were despatched by post to the assessee on 12-4-1996 and 12-3-1996 and so they were deemed to have been served on the petitioner. Having been of the said view, the appeals were rejected on the point of limitation.

It is the case of the petitioner that its properties were scheduled to be auctioned by issuing proclamation of sale dated 10-3-2005 by means of a publication in Deccan Chronicle Daily dated 11-3-2005. The petitioner says that it was not at all liable for the assessment sought to be made by disallowing the MODVAT credit in an amount of Rs.6,50,461.25p. and Rs.1,62,396.25p. respectively. The grievance appears to be that they have not been served with the orders in original as otherwise they would have preferred appeals as against them as was done by them earlier against the orders.

Inter alia, in the affidavit filed in support of the writ petition, it has been averred that in the month of July/August 2004, the authorities insisted the petitioner to write a letter addressed to them and accordingly obtained the letter dated 6-8-2004 informing *inter alia* about filing of the appeals before the appellate authority. In reply thereto, by a letter dated 24-8-2004, third respondent denied the fact of filing the appeals.

Learned Senior Standing Counsel for Central Government represents that on its own showing the petitioner had knowledge about the orders in original and failed to prefer the appeals. It is, however, disputed by the petitioner. Be that as it may, from the above matrix, it is obvious that the date of receipt of the orders in original and the date of their despatch are in dispute, and being questions of fact are required to be decided by the authorities. The period of limitation would begin to run only from the date of service of the order in original on the petitioner. As discussed hereinabove, the impugned order reads that the orders in original were despatched by post. In this connection, it is appropriate to consider Section 37C of the Central Excise Act, 1948, which reads as under.

"SECTION 37C. Service of decisions, orders, summons, etc.- (1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served, -

a. by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgement due, to the person for whom it is

intended or his authorised agent, if any;

b. if the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;

c. if the decision, order, summons or notice cannot be served in the manner provided in clauses (a) and (b), by affixing a copy thereof on the notice board of the officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post or a copy thereof is affixed in the manner provided in sub-section (1)."

From a perusal of the above provision, it is obvious that summons or notice shall be sent by Registered Post with Acknowledgement Due. Once it is shown to have been posted thus the deeming clause operates, and notwithstanding the fact whether there has been effective service, it can be deemed under law that the notice thus posted had been served. Since it has not been mentioned in the impugned order that the notices have been served by Registered Post with Ack. Due, the period of limitation cannot begin to run as against the petitioner for preferring the statutory appeal. These aspects have not been considered by the learned Commissioner in the impugned order. He proceeded on the premise that there is deemed service, thereby committed illegality in passing the impugned order.

For the above reasons, it requires to be interfered with and the matter shall be remitted to the appellate authority for fresh consideration about the sufficiency or otherwise of the service of notice and whether the appeals have been filed within the period of limitation.

Since we are inclined to interfere with the order and remit the matter back to the appellate authority for fresh consideration on the point of limitation, equities shall have to be worked out. Keeping in view the interests of both the parties and the hardship to be caused to the petitioner if the property is brought to sale as scheduled, we are of the considered view that if the principal amount of Rs.6,50,461/- in OIO No.73/96, dated 8-3-1996 and Rs.1,62,396/- in OIO No.92/96, dated 28-3-1996 are directed to be paid, in the event of the appellate authority coming to a conclusion that there is sufficient cause for condoning the delay and

consequently to entertain the appeal, waiving the pre-deposit for entertaining the appeal, regardless of the fact that the principal amount with interest comes up to Rs.23,69,268/-, the interests of both the parties would be subserved. We are inclined to dispose of the writ petition with the directions as under.

The petitioner shall deposit the principal amount (Rs.6,50,451/- and Rs.1,62,396/-) within six weeks from the date hereof. Learned counsel for the petitioner requests six weeks time for depositing the said amount, which is beyond the date of auction. The auction, therefore, shall be postponed to a future date and in the event the petitioner deposits the amount within six weeks from the date hereof, the respondents shall not auction the property subject to the result of the appeals to be entertained by the appellate authority consequent to the directions given hereinabove. In the event of the petitioner committing default, the authorities are at liberty to proceed with the auction without further requirement of formalities like the publication of notice since the petitioner waives the same.

With the above directions, the writ petition is disposed of. No order as to costs.

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(M.H.S.ANSARI, J.)

16th March 2005.

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(T.Ch. SURYA RAO, J.)

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